

December 9, 1999

Michael J. Scaglione, Esq.

Herzfeld & Rubin

801 Brickell Avenue

Suite 1501

Miami, FL 33131

Re: FOIA appeal, your letter dated November 8, 1999

On October 13, 1999, Mr. Michael Lozoff of your firm filed a Freedom of Information Act (FOIA) request for copies of all sworn statements compiled by NCUA's Office of General Counsel in furtherance of NCUA's investigation of _____. Dianne Salva, NCUA's FOIA Officer, denied your request on October 29, 1999. All responsive documents were withheld in accordance with the attorney work-product privilege included in exemption 5 of the FOIA, 5 USC 552(b)(5). We received your November 8, 1999 appeal on November 10. Your appeal is denied. The responsive documents (transcripts of seven depositions) continue to be withheld in their entirety pursuant to exemption 5 of the FOIA.

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency." 5 USC 552(b)(5). Included within exemption 5 is information subject to the attorney work-product privilege. This privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. The witness statements (depositions) were clearly prepared in contemplation of litigation. The D.C. Circuit Court of Appeals has held that witness statements are protectible under the work-product privilege of exemption 5. Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987). In exemption 5 cases involving the deliberative process privilege, it is the general rule that factual material must be separated out from deliberative material and disclosed. This disclosure rule does not apply to the attorney work-product privilege. In Martin, the court rejected a factual/deliberative distinction and approved withholding witness statements in their entirety. In addition, the Supreme Court has held that termination of litigation does not vitiate the protection for material otherwise properly categorized as attorney work-product. There is no temporal limitation on work-product protection under the FOIA. FTC v. Grolier, 462 U.S. 19 (1983). The fact that NCUA has decided not to pursue its investigation of _____ any further does not affect the applicability of the attorney work-product privilege of exemption 5. The depositions are withheld in their entirety pursuant to exemption 5.

You note in your appeal that "an index, which includes general descriptions of each document sought by the requester, and explains the agency's justification for non-disclosure of each individual document or portion thereof, is required." Production of a detailed index, known as a Vaughn index, describing the withheld information, is not required at this stage of FOIA

processing. Cases interpreting the FOIA have held that agencies need not provide a Vaughn Index (*see Vaughn v. Rosen*, 484 F2d 820 (D.C. Cir. 1973)) unless ordered by a court after a FOIA plaintiff has exhausted the administrative process. *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1 (D.D.C. 1995). As noted above, there are seven depositions being withheld. They total approximately 400 pages.

Pursuant to 5 U.S.C 552(a)(4)(B), you may seek judicial review of this determination by filing suit against the NCUA. Such a suit may be filed in the United States District Court in the district where the requester resides, where the requester's principle place of business is located, the District of Columbia, or where the documents are located (the Eastern District of Virginia).

Sincerely,

Robert M. Fenner

General Counsel

GC/HMU:bhs

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